Nos. 83-703 and 83-1031

In the Supreme Court of the United States

OCTOBER TERM, 1983

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

JOETTE LORION, ETC., ET AL.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b) to review a Nuclear Regulatory Commission order denying respondent's request for suspension of a nuclear power plant's operating license.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15)[1] is reported at 712 F.2d 1472. The decision of

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[1] "Pet. App." refers to the Appendix to the Petition in No. 83-703.

the Director of the Office of Nuclear Reactor Regulation (Pet. App. 16-25) is reported at 14 N.R.C. 1078.

JURISDICTION

The judgment of the court of appeals (83-1031 Pet. App. 1a-2a) was entered on July 26, 1983. A petition for rehearing was denied on September 22, 1983 (*id.* at 3a-5a). The petition for a writ of certiorari in No. 83-703 was filed on October 28, 1983, and the petition in No. 83-1031 was filed on December 21, 1983. The petitions were granted and the cases were consolidated on March 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 2342(4) is reproduced at Pet. App. 26. Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. 2239, is reproduced at Pet. App. 26-28. 10 C.F.R. 2.202 and 2.206 are reproduced at Pet. App. 28-31.

STATEMENT

1. Section 2342(4) of Title 28 of the United States Code provides that the courts of appeals have exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of title 42." The provision referred to—Section 189 of the Atomic Energy Act—deals with hearings and judicial review. Section 189(a) (42 U.S.C. 2239(a))[2] provides that

[2] Congress amended Section 189(a) in 1983. NRC Authorization Act, Pub. L. No. 97-415, § 12, 96 Stat. 2073. The amendments were intended to overturn the decision in *Sholly* v. *NRC*, 651 F.2d 780 (D.C. Cir. 1980), vacated, No. 80-1640 (Feb. 22, 1983), which had held improper the Commission's practice of not providing a prior hearing on license amendments not involving significant hazards considerations. Since the amendment has not yet been codified, we will refer throughout to 42 U.S.C. 2239(a) or Section 189(a) as a shorthand for the currently effective version.

> (1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, * * * and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Section 189(b) (42 U.S.C. 2239(b)) states that

> [a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [28 U.S.C. 2342(4)].

NRC regulations permit the Director of the Office of Nuclear Reactor Regulation to begin a proceeding for suspending, revoking, or modifying a license by serving on the licensee an order to show cause alleging either the violations with which the licensee is charged, or other facts deemed sufficient to warrant the proposed action. The licensee then answers and may demand a hearing. 10 C.F.R. 2.202.

The regulations also permit any person to request that the Director institute such a proceeding.[3] Re-

[3] In the early 1970's the Commission had no formal means of dealing with citizens' letters requesting specific enforcement action against licensees. See, *e.g.*, Memorandum and Order Regarding Filing of Petition for Shutdown of Certain Reactors, 38 Fed. Reg. 23815 (1973). The Commission

quests must specify what action is desired, and must set forth supporting facts. 10 C.F.R. 2.206(a). Upon receipt of such requests, the NRC typically publishes a notice in the Federal Register so that comments may be submitted.[4] The Director is then required, within a reasonable time, either to issue a show cause order against the licensee, or to advise the person who made the request of his reasons for declining to act. 10 C.F.R. 2.206(b).

The NRC has interpreted Section 2.206 to require the issuance of a show cause order if a "substantial health or safety issue ha[s] been raised" by the request. *In re Consolidated Edison Co.* (*Indian Point, Units 1, 2 & 3*), 2 N.R.C. 173, 176 (1975). In deciding whether to issue a show cause order, the Director does not hold any kind of formal hearing. He "is free to rely on a variety of sources of information, including staff analyses of generic issues, documents issued by other agencies, and the comments of the license on the factual allegations." *In re Northern Indiana Public Service Co.* (*Bailly Generating*

adopted 10 C.F.R. 2.206 in 1974 "to provide a procedure for the submittal of such requests to the Director of Regulation." 39 Fed. Reg. 12353 (1974).

[4] In 1983 the Commission received 28 petitions under Section 2.206. In 19 of those cases it published notice that it had received the request. See 48 Fed. Reg. 4589, 10150, 13300, 21225, 23502, 27327, 31119, 34371, 44687, 44688, 48881, 48882, 49395, 52370(2), 54550, 56127, 57037 (1983); 49 Fed. Reg. 4572 (1984).

Section 2.206 requests may at times lead to rather elaborate, though informal, proceedings. For example, in *In re Public Service Co. (Marble Hill Nuclear Generating Station, Units 1 & 2)*, 14 N.R.C. 1085 (1981), the proceeding consisted in part of nine submissions by the petitioner, including two Section 2.206 requests, a Section 2.206 denial, a request by the Commission for further comments, and a supplemental Section 2.206 denial.

Station, Nuclear-1), 7 N.R.C. 429, 433 (1978), aff'd, 606 F.2d 1364 (D.C. Cir. 1979). The Director's decision not to institute a proceeding is reviewable by the Commission on its own motion (10 C.F.R. 2.206(c)).

2. On September 11, 1981, respondent Joette Lorion ("respondent"), on behalf of the Center for Nuclear Responsibility, wrote a letter to the NRC asking that it shut down Florida Power & Light Company's Turkey Point Plant, Unit 4 (J.A. 6-8). Respondent asserted that the steam generators needed to be inspected (*id.* at 7). She also claimed that the steam generator tubes should be examined for possible leaks (*id.* at 7-8). Finally, she asked the Commission to consider suspending the plant's operating license because of concerns over the safety of the reactor pressure vessel in the event of thermal shock (*id.* at 6, 8). Treating respondent's letter as a request under 10 C.F.R. 2.206, the Commission referred it to the Director of Nuclear Reactor Regulation (Pet. App. 2-3).

On the basis of a 547-page record, the Director issued a decision on November 5, 1981, denying respondent's request.[5] He concluded that the issue of shutting down the plant for inspection of its steam generators was moot, since that very action had been taken on October 18, 1981 (Pet. App. 19).

The Director went on to review the relevant provisions of the utility's license and amendments dealing with the matter of steam generator tube leakage. He also examined the plant's operations since 1976 " 'under strict requirements imposed by the NRC staff' " to deal with that problem. Pet. App. 17 (quoting *Florida Power & Light Co.* (*Turkey Point Plant, Unit 3*), 12 N.R.C. 386, 388 (1980)). He concluded

[5] Portions of the record are reproduced at C.A. App. 1-164.

that respondent had not "advance[d] any factual basis for anticipating" that "a handful of tubes" might rupture (Pet. App. 21). In any event, the Director found that the question was being closely monitored, and that "[t]he procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety" (Pet. App. 22).

Finally, the Director examined the question of thermal shock to reactor pressure vessels, and actions by the NRC staff and the utility for dealing with that issue. He determined that the condition of the reactor pressure vessel did not warrant a proceeding for license suspension, given the ongoing supervision of that matter by the NRC staff and the study, then in progress, of Unit 4's pressure vessel (*id.* at 22-24). The Director's decision was filed with the Commission in accordance with 10 C.F.R. 2.206(c). The Commission declined to disturb the Director's decision.[6]

3. Respondent then filed a petition for review in the court of appeals pursuant to 28 U.S.C. 2342(4) and Section 189(b) of the Act. She argued that the decision not to issue a show cause order was arbitrary and capricious, and that (given the express terms of Section 189(a)) the Commission had improperly declined to hold a hearing on her request. Although no party questioned its jurisdiction, the

[6] When she received the Director's decision, and before the time during which the Commission could exercise its sua sponte power of review had expired, respondent notified the Commission that her letter had been only advisory, and that she had not intended it to be a formal petition under 10 C.F.R. 2.206. She requested that the Commission vacate the Director's decision for that reason.

court of appeals held that it lacked jurisdiction to review the denial of respondent's request.[7]

The court began by noting the established principle that the NRC need not hold a hearing in passing on a Section 2.206 request, since that determination was not "a 'proceeding' under 42 U.S.C. § 2239(a)" (Pet. App. 7). See *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (D.C. Cir. 1979); *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979).[8] The court found this principle inconsistent with "a separate line of authority" holding that the consideration and denial of a Section 2.206 request *was* a "proceeding" under 42 U.S.C. 2239(b) for purposes of judicial review, and so was reviewable in the court of appeals (Pet. App. 8). See *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025 (D.C. Cir. 1982); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218 (7th Cir. 1982). See also *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d 1261 (D.C. Cir. 1979). The proper resolution of that inconsistency, the court concluded, was to

[7] The court did find, as an initial matter, that the NRC had properly treated respondent's letter as a request under 10 C.F.R. 2.206. It also noted that none of the arguments raised by respondent under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, were properly before the court, since they had not been first presented to the agency (Pet. App. 4).

[8] The NRC stated in its brief in the court of appeals that "[a] request under 10 C.F.R. 2.206 is not a licensing proceeding within the meaning of Section 189" (C.A. Br. 23 n.8). This statement was made in response to respondent's argument that every Section 2.206 request deserved a formal, adjudicatory hearing. It was not intended as a concession that denial of such requests without a hearing was not reviewable in the court of appeals. In the petition for rehearing counsel for the NRC acknowledged the failure to make this distinction clear.

permit review in the courts of appeals only of final orders entered in "formal 'proceedings' "—*i.e.*, those where a hearing is held (Pet. App. 11). Orders terminating "the informal process" appropriate to Section 2.206 requests, by contrast, would fall within the general federal question jurisdiction of the district courts (Pet. App. 10-11). See 28 U.S.C. 1331.

The court accordingly transferred the case to the district court pursuant to 28 U.S.C. 1631 (Pet. App. 15). The government sought rehearing en banc on the question of jurisdiction, but its request was denied (83-1031 Pet. App. 3a-5a).

SUMMARY OF ARGUMENT

The language and history of Section 189 of the Atomic Energy Act support direct review of this case in the court of appeals. That result is bolstered by compelling practical considerations.

A. 1. Section 189(a) makes clear that there may be "proceedings" in which no hearing is held, *e.g.*, because none is requested, or because there is no issue of fact to be determined. The Administrative Orders Review Act (Hobbs Act)—under which review should take place in this case—uses the term "proceedings" in the same sense. It is true that Section 189(a) says that "the Commission *shall* grant a hearing" in any proceeding. But that language does not bind the Commission to go through wasted motion, or to carry out a full-scale enforcement action where there is no substantial health or safety issue. The Seventh Amendment also says that "the right of trial by jury *shall* be preserved" in suits at common law; but it does not require that a jury be empanelled where there is no genuine issue of material fact. See Fed. R. Civ. P. 56(c).

2. Language in two cases suggests that no hearing need be held on Section 2.206 requests, because NRC determinations under that regulation are not "proceedings" for purposes of Section 189(a). But a more careful reading of those cases makes clear that they in fact stand for a more obvious principle: that the Commission's rules can "require[] an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing." *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 214 (1980).

Since the term "proceedings" in Section 189(a) is not limited to cases in which "formal hearings" are held (Pet. App. 13), there is no obstacle to court of appeals review of this case under Section 189(b), which says that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in [the courts of appeals]."

B. The legislative history of Section 189 also supports court of appeals review in this case.

1. The history of that section shows that Congress intended the courts of appeals to review all NRC orders affecting licensees. The original bill introduced in Congress authorized court of appeals review of "any order of the Commission," including any action taken "in connection with" the revocation or modification of a license. H.R. 8862, 83d Cong., 2d Sess. §§ 188, 189 (1954). Although that authorization was substantially curtailed after hearings, it was later reexpanded to its current form in order "to clarify the intent of Congress with respect to the extent of the applicability of [court of appeals review]." 100 Cong. Rec. 10686 (1954).

The legislative history shows still more clearly that the right to direct review was not intended to depend

on whether a hearing was held. The original bill, which did provide for direct review, did not even include the right to a hearing. That right was later added to Section 181. And shortly before passage the hearing provision was moved to Section 189. That change was made in order to limit the right to a hearing to licensing cases where review was available. But it inverts Congress's purpose to say that the right to direct review depends on whether a hearing was held.

2. Congress's choice of the Hobbs Act to govern review in the courts of appeals was also significant. That Act, passed only four years before the Atomic Energy Act, is expressly designed to permit review of agency orders entered where no hearing has been held. In passing the Hobbs Act Congress had uppermost in its mind orders of the Federal Communications Commission—the very agency whose licensing scheme is copied in the Atomic Energy Act. FCC orders are reviewable in the courts of appeals even where no hearing is held.

C. Our interpretation of Section 189 is supported by compelling practical considerations. The court of appeals' construction will predictably lead to simultaneous review, in the district courts and the courts of appeals, of closely connected NRC orders. Even where simultaneous review does not occur, the court's decision will necessitate wasteful serial review. "This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request * * *: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much." *Rockford League of Women Voters* v. *NRC*, 679 F.2d at 1221.

District court review is unnecessary in this class of cases, because there is no need for fact-finding and issue-clarification. In fact, the courts of appeals can perform the job of review *better* than the district courts. They have developed a reservoir of experience in this area precisely because Section 189(b) requires them to review all the other cases involving NRC license orders and rulemaking proceedings.

ARGUMENT

THE COURTS OF APPEALS HAVE EXCLUSIVE JURISDICTION TO REVIEW NRC ORDERS DENYING SECTION 2.206 REQUESTS

The issue in this case is whether the denial of a Section 2.206 request terminates the kind of "proceeding" that Section 189(b) of the Atomic Energy Act makes reviewable in the courts of appeals. That question cannot be resolved with absolute certainty by reference to either the language or the legislative history of Section 189, since the procedure created by Section 2.206—private requests for enforcement action—did not exist at the time the Atomic Energy Act was enacted. See note 3, *supra*.[9] We believe,

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[9] We note at the outset that there is nothing unique about the promulgation of regulations, like 10 C.F.R. 2.206, that augment the number of orders reviewable in the courts of appeals. This Court addressed that very issue in *Foti* v. *INS*, 375 U.S. 217, 229-230 & n.16 (1963), where it held:

> We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals.[16]

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[16] * * * While presumably denials of § 243(h) relief were not covered by § 106(a) at the time of its enactment, it does not seem incongruous to assume that such

nevertheless, that the most natural construction of Section 189 directs that review should occur in the courts of appeals. This conclusion is also most consistent with the indications of congressional intent that appear in the legislative history. One should not strain to reach a different conclusion, since compelling practical considerations support that result.

A. The Language And Structure Of Section 189 Of The Atomic Energy Act Envision Court Of Appeals Review Of Final Orders Entered In "Proceedings" Where No Hearing Has Been Held

According to the court of appeals, it was precluded from taking jurisdiction over respondent's petition by "the clear-cut language of [Section 189]" (Pet. App. 10). That section, the court said, used the term "proceeding" to mean "formal 'proceedings' "—those in which "formal hearings" were held (*id.* at 11, 13). Because no hearing was held in this case under Section 189(a), there was no "proceeding" reviewable under Section 189(b). Only by reading the Act in that fashion, the court believed, could it avoid the anomaly of having the term " 'proceeding' * * * mean one thing for procedural purposes and another for jurisdictional purposes" (Pet. App. 11).

The language and structure of Section 189 do not support these conclusions. Section 189(a), which deals with the right to a hearing, plainly envisions "proceedings" in which no hearing is held. Section 189(b) makes these and other "proceedings" reviewable in the courts of appeals. The cases holding that

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orders, because of the change in administrative regulations making such decisions an integral part of the deportation proceedings conducted by a special inquiry officer, are now within the reach of § 106(a)'s judicial review provisions.

the Commission may dispose of some Section 2.206 requests without holding a hearing are consistent with this interpretation of the Act.

1. *Section 189(a) Does Not Require A Hearing To Be Held In Every Proceeding*

a. Section 189(a) does not, as the court of appeals believed, equate "proceeding" with agency action in which a hearing is held. On the contrary, it plainly presumes that there may be proceedings without any hearing. The first sentence of Section 189(a) states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding * * *." That means that in some proceedings no hearing will be held because none is requested. It also means that in other proceedings no hearing will be held because the only request for one comes from a person who has no "interest [that] may be affected by the proceeding."

Even when a hearing is requested by an interested party, there are reasons why none may be held. An evidentiary hearing may be denied if the party fails to specify the basis for his request, *BPI* v. *AEC*, 502 F.2d 424 (D.C. Cir. 1974), or fails to raise an issue within the scope of the proceeding, *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983). A licensing proceeding may also be concluded without a hearing when the contentions advanced present no genuine issue of material fact. 10 C.F.R. 2.749.

In still another class of cases the Commission may decline to hold a hearing because it concludes that it lacks jurisdiction. In *Natural Resources Defense Council, Inc.* v. *NRC*, *supra*, for example, the NRC held that it lacked licensing authority over certain waste-storage tanks to be built by the Energy Research and Development Administration. 606 F.2d at

1264-1266. In such a case it would make little sense for the NRC then to hold a hearing on whether the tanks would satisfy substantive license requirements (*e.g.*, whether they would threaten the public health and safety). Yet the court of appeals held that the Commission's order had been " 'entered in [a] proceeding' for 'the granting . . . of [a] license,' " and so was reviewable under Section 189(b), since "a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license" (606 F.2d at 1265). But see *Union of Concerned Scientists* v. *NRC*, No. 82-2053 (D.C. Cir. May 25, 1984), slip op. 11.

In short, there are a variety of screening procedures by which a Section 189(a) proceeding may be concluded without a hearing. In this case the Director found that one of respondent's claims was moot, that there was no factual basis for the second, and that the third presented no substantial health or safety issue warranting further proceedings. He therefore declined to issue a Section 2.202 order, and terminated the proceeding short of a hearing.

This distinction between a "proceeding" (a term which describes the entire litigation process at the administrative level) and a "hearing" (one of the procedures to be followed in many such proceedings) is hardly unique. The very same distinction is drawn in the Administrative Orders Review Act (28 U.S.C. 2341 *et seq.*) (the Hobbs Act), to which Section 189(b) refers for judicial review of these cases. 28 U.S.C. 2349(a) states that "[t]he court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review." Once it has jurisdiction, the court may take any number of actions "pending the final hearing and determination of the petition." 28 U.S.C. 2349(b). 28 U.S.C. 2346 states

that the "proceeding" may be "terminated on a motion to dismiss"—*i.e.*, prior to a "hearing" in the court of appeals. Cf. 28 U.S.C. 2345 ("prehearing conference"). Moreover, a final judgment in the "proceeding to review" is itself subject to further judicial review in this Court (28 U.S.C. 2350); and such a judgment may be entered, in response to a motion to dismiss (28 U.S.C. 2346), before a hearing is held in the court of appeals.

The Hobbs Act also uses the term "proceedings" to describe cases where no hearing has been held before the agency whose action is being reviewed. 28 U.S.C. 2347(b) (emphasis added) states that

> *When the agency has not held a hearing* before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—
>
> (1) *remand the proceedings* to the agency to hold a hearing, when a hearing is required by law;
>
> (2) *pass on the issues presented*, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented * * *.

The independence of the terms "proceeding" and "hearing" is thus well recognized in other contexts. The court of appeals may nevertheless have believed that they were inseparable here because Section 189(a) states that "[i]n any proceeding * * * the Commission shall grant a hearing * * *." But the word "shall" is not intended to be absolute. The Seventh Amendment also states that "In Suits at common law * * * the right of trial by jury *shall* be

preserved" (emphasis added). But the constitutional right to a particular mode of trial does not preclude termination of "Suits at common law" before the jury is empanelled if the court concludes that the plaintiff has presented no genuine factual issue (Fed. R. Civ. P. 56(c)), or a bench trial if all parties waive a jury (Fed. R. Civ. P. 38(d)). Nor does the summary termination of the case, or trial without a jury, mean that it was not a "Suit at common law." Similarly, termination of a proceeding for license suspension without a hearing does not mean that the agency's action never ripened into the kind of "proceeding" specified in Section 189. It may only mean that there was no substantial health or safety issue to warrant going further, or that no hearing was requested.

b. This common sense understanding of when a "proceeding" begins, and what it entails, is the one adopted by the Second and Seventh Circuits.[10] Indeed, it was consistently adhered to within the District of Columbia Circuit prior to this case.[11] It has also been accepted in considered statements by the Third and Eighth Circuits, which have addressed the issue in the course of holding that district courts may not

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[10] *County of Rockland* v. *NRC*, 709 F.2d 766, 774 (2d Cir.) cert. denied, No. 83-329 (Nov. 28, 1983); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218, 1219-1221 (7th Cir. 1982). See also *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979) (accepting jurisdiction without considering the question); *City of West Chicago* v. *NRC*, 701 F.2d 632, 653 (7th Cir. 1983) (dictum).

[11] *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025, 1027-1028 (D.C. Cir. 1982); *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d 1261 (D.C. Cir. 1979). See also *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363 (D.C. Cir. 1979) (accepting jurisdiction without considering the question).

short-circuit the process of agency decision and appellate review.[12] Finally, it has been followed by every district court that has considered the problem.[13]

These cases have held that consideration of a Section 2.206 petition is—like the jurisdiction determination in *Natural Resources Defense Council, Inc.* v. *NRC*—a "necessary first step in th[e] proceeding" to suspend, revoke, or amend any license. *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218, 1221 (7th Cir. 1982); *County of Rockland* v. *NRC*, 709 F.2d 766, 774 (2d Cir.), cert. denied, No. 83-329 (Nov. 28, 1983). That first step may be followed by a show cause order, answer, hearing, and decision to suspend, revoke, or amend. But the process may also be terminated at an earlier stage. The fact that it is makes it no less a "proceeding" for purposes of judicial review.

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[12] *Simmons* v. *Arkansas Power & Light Co.*, 655 F.2d 131, 134 (8th Cir. 1981); *Susquehanna Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231, 235-239 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981). Justice Rehnquist, dissenting from the denial of certiorari in *Susquehanna Valley Alliance*, noted with apparent approval the court of appeals' "hold[ing] * * * that the Atomic Energy Act claims are reviewable exclusively in the Court of Appeals" (449 U.S. at 1099).

[13] *Desrosiers* v. *NRC*, 487 F. Supp. 71, 75 (E.D. Tenn. 1980) (dictum); *Paskavitch* v. *NRC*, 458 F. Supp. 216, 217 (D. Conn. 1978) (dictum); *Honicker* v. *Hendrie*, 465 F. Supp. 414, 418-419 (M.D. Tenn.), appeal dismissed, 605 F.2d 556 (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980). See *Sunflower Coalition* v. *NRC*, 534 F. Supp. 446, 448 (D. Colo. 1982). But cf. *Drake* v. *Detroit Edison Co.*, 443 F. Supp. 833 (W.D. Mich. 1978).

2. *Review Of This Case Under Section 189(b) Is Consistent With The Cases Dealing With The Right To A Hearing*

The court of appeals believed that taking jurisdiction here would be inconsistent with several cases holding that the NRC need not hold a hearing in passing on a Section 2.206 request, since that determination was not "a 'proceeding' under 42 U.S.C. § 2239 (a)" (Pet. App. 7). After all (*id.* at 11):

> the statutory language of 42 U.S.C. § 2239(b) explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal "proceedings" specified in 42 U.S.C. § 2239(a). This unusual, interlocking scheme does not allow "proceeding" to mean one thing for procedural purposes and another for jurisdictional purposes.

Contrary to the court's assumption, however, the interpretation we propose is entirely consistent with the principle underlying the cases dealing with the right to a hearing on Section 2.206 requests.

a. We begin by noting that the "interlocking scheme" created by Section 189 is not as sophisticated as the court of appeals imagined. Section 189(b) simply directs that the courts of appeals shall review "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." The "kinds" of proceedings specified in Section 189(a) are those "for the granting, suspending, revoking, or amending of any license or construction permit."[14] Section 189(a) says nothing about "formal proceedings." Nor, as

[14] In addition, Section 189(a) mentions proceedings "for the issuance or modification of rules and regulations dealing with the activities of licensees, and * * * for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title" (42 U.S.C. 2239(a)(1)).

we made clear above, does it require that a hearing occur in every proceeding to which it refers.

Several courts of appeals have held that the NRC need not hold a hearing whenever a Section 2.206 request is filed. See *Porter County Chapter of the Izaak Walton League* v. *NRC*, *supra*; *Illinois* v. *NRC*, *supra*. Those decisions support our contention that the language of Section 189(a) ("[i]n any proceeding * * * the Commission *shall* grant a hearing") is not to be read in an absolute fashion. See also *BPI* v. *AEC*, *supra*; *Bellotti* v. *NRC*, *supra*. They thus implement in this context the principle—generally accepted elsewhere in the law—that agencies have considerable discretion to set threshold requirements for hearings.[15] But, improvident dicta aside, their rationale has no effect on the choice of forum for review.

In *Porter County Chapter of the Izaak Walton League*, for example, the court rejected a claim (similar to respondent's) that the Commission was required to hold a permit revocation hearing because new evidence raised questions about the safety of a

[15] We note in this regard that the threshold for granting a Section 2.206 request and issuing a show cause order differs from that for granting a hearing in an initial licensing proceeding. In the latter case a person with the requisite standing need only advance a contention raising a genuine issue of material fact, while in the former case a person must raise a substantial health and safety concern warranting issuance of a show cause order. A mere dispute about factual issues is not sufficient to require granting a Section 2.206 petition. *In re Consolidated Edison Co. (Indian Point, Units 1, 2 & 3)*, 2 N.R.C. 173 (1975). This difference in the threshold for a hearing is due to the distinction between initial licensing, where all aspects of the application must be judged by the agency, and enforcement cases, where the agency has substantial discretion regarding whether to take action and ordinarily will not do so absent a showing that such action is warranted.

power reactor's containment vessel. The court noted the "wide discretion" that agencies have in fashioning their own rules of procedure, and concluded that Section 189(a) left the Commission free to "undertake preliminary inquiries in order to determine whether [a Section 2.206] claim is substantial enough under the statute to warrant full proceedings." 606 F.2d at 1369 & n.15. See also *Illinois* v. *NRC*, 591 F.2d at 15-16.

The problem addressed in *Porter County Chapter* is similar to the issue in *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980). The Federal Water Pollution Control Act (33 U.S.C. 1342) requires an "opportunity for public hearing" before permits may be issued for the discharge of pollutants. The legislative history of that Act also reveals "a strong congressional desire that the public have input in decisions concerning the elimination of water pollution." 445 U.S. at 215. The EPA nevertheless promulgated regulations requiring parties who requested a hearing on a proposed pollutant discharge permit to show that material facts were in dispute. This Court sustained the regulations, noting that it had frequently upheld similar "agency rules * * * that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing." 445 U.S. at 214. See also *National Independent Coal Operators' Ass'n* v. *Kleppe*, 423 U.S. 388, 397-398 (1976); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 762 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Against that background it is easy to see that the Section 2.206 hearing cases ultimately do not rest on an interpretation of the word "proceeding" in

Section 189(a). Instead they stand for the more general principle that the NRC has authority to terminate such proceedings short of a hearing in the proper circumstances, including cases where issuance of a show cause order is not warranted. And if that is so, then confining judicial review of this case to the court of appeals creates no inconsistency between the "procedural" and "jurisdictional" provisions of the Act.

b. None of the possible objections to this analysis of the right-to-hearing cases is compelling. One such objection is that language in two of the cases suggests that no hearing is required because no Section 189 "proceeding" is begun by the mere filing of a Section 2.206 request. *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d at 1368; *Illinois* v. *NRC*, 591 F.2d at 14. But in neither case was that language necessary to the decision. Indeed, in *Illinois* v. *NRC* the question was not even disputed 591 F.2d at 14 n.3 (petitioner conceded that "there was no formal 'proceeding' in which [it] could intervene as of right"). Nor did either case consider the effect that such a conclusion would have on the right to direct review under Section 189(b).

The other possible objection to our analysis is that Section 2.206 (emphasis added) itself speaks of "a request * * * *to institute* a proceeding pursuant to § 2.202." And Section 2.202(a) (emphasis added) says that the Director "*institute*[*s*] a proceeding * * * by serving on the licensee an order to show cause." That language means that there is no opportunity for a hearing until the Director grants the request and issues a show cause order. 10 C.F.R. 2.202(b). But it also seems to say that the request itself does not "institute a proceeding," so that an order denying the request would not be reviewable in the court of appeals. Perhaps, then, the regulations

themselves support the court of appeals' conclusion—that the term "proceeding" has been given one meaning "for procedural purposes and another for jurisdictional purposes" (Pet. App. 11).

These linguistic difficulties dissolve, however, if one keeps in mind the realities of the process. We noted above that an order holding that the NRC had no jurisdiction over a license proceeding was nevertheless considered as an order entered in such a "proceeding" for purposes of direct review. See pages 13-14, *supra*. That is just an application in the agency context of the familiar rule that courts have jurisdiction to determine their own jurisdiction. See *United States* v. *United Mine Workers*, 330 U.S. 258, 290-295 (1947). If the decision is against jurisdiction, it can lead to interesting scholastic debates about whether there ever *was* a "proceeding" (or a "civil action[] arising under the Constitution, laws, or treaties of the United States" (28 U.S.C. 1331)). But the more pragmatic approach is to ignore that metaphysical question, and assume that decision of such preliminary issues is necessarily encompassed by the statutory term defining original or appellate jurisdiction.

The same can be said of orders denying Section 2.206 requests. In one sense, as the regulations show, such a request is a call upon the NRC to use its prosecutorial resources in an enforcement proceeding. And in that sense one could argue that, if the Commission denies the request, there never was a "proceeding." (It is certainly true that insisting on a hearing before the request is granted would put the cart before the horse, just as holding a trial before addressing the issue of jurisdiction inverts the natural order of things.) But the Commission has bound itself to act on such requests if they raise a "substantial health or safety issue." *In re Consolidated Edison Co.* (*Indian Point, Units 1, 2 & 3*), 2 N.R.C. 173, 176 (1975). And for purposes of reviewing orders issued under that standard, the more practical approach is to treat the NRC's decisions as necessarily encompassed by the statutory term.

This is surely consistent with the intent of Section 2.206. For whatever implications one might find in the language of the regulation, it was not intended as an administrative interpretation of the term "proceeding" in Section 189(b). The Commission has, after all, consistently taken the position that an order denying a Section 2.206 request is reviewable only in the courts of appeals. See cases cited at notes 10-13, *supra*.

B. The Legislative History Of Section 189 Supports Court Of Appeals Review In This Case

In *Natural Resources Defense Council, Inc.* v. *NRC*, 606 F.2d at 1265 n.11, the District of Columbia Circuit concluded that the interpretation of Section 189 which it now rejects "is fully consistent with [the legislative] history." We agree. The legislative history makes three points relevant to the issue in this case. First, it shows that Congress intended the courts of appeals to review all final orders entered by the Commission in proceedings that might affect licensees. Second, it demonstrates that review in the court of appeals was not keyed to a prior hearing before the Commission; in fact, the hearing and review provisions had independent origins, and were not combined in Section 189 until late in the legislative process. Third, in selecting the Hobbs Act to govern orders entered in license proceedings Congress consciously paralleled the FCC review system, which gives the courts of appeals exclusive jurisdiction to review orders like the one at issue here.

1. *Congress Intended The Courts Of Appeals To Review All NRC Orders Affecting Licensees, Whether Or Not A Hearing Was Held*

a. A major purpose of the Atomic Energy Act of 1954 was to permit the private exploitation of nuclear energy through an elaborate system of construction permits and operating licenses. S. Rep. 1699, 83d Cong., 2d Sess. 3, 8 (1954). The Act consolidated all the procedures concerning permits and licenses—applications, terms, revocation, modification—in chapter 16, the last provision of which is Section 189. Ch. 1073, §§ 181-189, 68 Stat. 953-956; see 42 U.S.C. (& Supp. V) 2231-2239. It is manifest from the very structure of the Act that insofar as the licensing process occasioned judicial review, Congress wished it to occur in the courts of appeals.

That was certainly the intention of the original bill proposed by the Joint Committee on Atomic Energy. H.R. 8862, 83d Cong., 2d Sess. §§ 188-189 (1954), *reprinted in* I AEC, *Legislative History of the Atomic Energy Act of 1954* (*Leg. Hist.*), at 166-168 (1955); Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *A Proposed Act to Amend the Atomic Energy Act of 1946*, at 37-38 (Joint Comm. Print Apr. 1954) (1 *Leg. Hist.* 97-98).[16] That bill established a special Review Board to "review, on petition, *any action* of the Commission *in connection with*" the grant, denial, revocation, or modification of a license or permit. H.R. 8862, § 188 (1 *Leg. Hist.* 166) (emphasis added).[17] The Board's decisions automatically

[16] A companion bill to H.R. 8862 was introduced in the Senate. S. 3323, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 181). (For the Court's convenience we will include citations to the *Legislative History*, where appropriate, in parentheses after the document referred to.)

[17] The Board was also empowered to review Commission action adopting or modifying regulations that affected certain licensees (including those who operated power plants), or determining "just compensation pursuant to the provisions of this Act." H.R. 8862, § 188 (1 *Leg. Hist.* 166); cf. note 14, *supra*.

became final orders of the Commission (*ibid.*). And Section 189 of the original bill then said that "[a]ny proceeding to enjoin, set aside, annul or suspend *any order* of the Commission shall be brought as provided by and in the manner prescribed in the [Hobbs Act]" (1 *Leg. Hist.* 167) (emphasis added)—*i.e.*, in the courts of appeals.

The Joint Committee then held hearings on the bill, in the course of which some doubt was expressed about the ability of the Review Board ("within the Commission" itself) to act impartially. *S. 3323 and H.R. 8862, To Amend the Atomic Energy Act of 1946: Hearings on S. 3323 and H.R. 8862 Before the Joint Comm. on Atomic Energy* (*AEA Hearings*), 83d Cong., 2d Sess. 290 (1954) (2 *Leg. Hist.* 1924). As a result the provision for a Board was eliminated, and Section 188 was collapsed into Section 189. Joint. Comm. on Atomic Energy, 83d Cong., 2d Sess., *Comm. Print* § 189 (May 21, 1954) (1 *Leg. Hist.* 335-336); H.R. 9757, 83d Cong., 2d Sess. § 189 (1954) (1 *Leg. Hist.* 631).[18] The new Section 189 made Commission actions directly reviewable in the courts of appeals, without any intermediate step. Review was limited, however, to:

[18] An identical substitute bill was reported favorably by the Joint Committee to the Senate and placed on the calendar. S. 3690, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 645); S. Rep. 1699, 83d Cong., 2d Sess. (1954) (1 *Leg. Hist.* 749); 100 Cong. Rec. 9260 (1954) (3 *Leg. Hist.* 3018).

> Any final order granting, denying, suspending, revoking, modifying or rescinding any license or construction permit * * *.[19]

No explanation was offered for this choice of language, which had the apparent effect of dropping—from the otherwise comprehensive review scheme—all final Commission orders (including those that terminated enforcement proceedings) that did not suspend, revoke, modify, or rescind a license.

The oversight was quickly remedied, however. Two weeks after the substitute bill was introduced, Senator Hickenlooper proposed an amendment giving the courts of appeals authority to review any final order entered by the Commission

> [*i*]*n any proceedings* * * * for the granting, suspending, revoking, or amending of any license or construction permit * * *.[20]

1 *Leg. Hist.* 1145 (emphasis added). As he explained, the change was designed "to clarify the intent of Congress with respect to the extent of the applicability of the [Hobbs Act.]" 100 Cong. Rec. 10686 (1954) (3 *Leg. Hist.* 3175). The bill passed the Senate and was enacted in essentially that form. 1 *Leg. Hist.* 37-38, 1342, 1450.

These changes made in the course of the bill's passage, seen against the background of chapter 16 of

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[19] The Review Board was also eliminated as a step to direct review in the courts of appeals of Commission orders "issuing or modifying rules and regulations dealing with the activities of licensees." H.R. 9757, § 189 (1 *Leg. Hist.* 631).

[20] The amendment also restored to the courts of appeals the review authority they had under the original bill (once the Review Board had acted) over final orders entered "in any proceeding for the payment of compensation, an award or royalties under Section 156, 186(c) or 188." 1 *Leg. Hist.* 1145. See note 17, *supra*.

the original Act (Sections 181-189), strongly suggest a congressional intent to give the courts of appeals exclusive authority to review all final Commission orders related to the licensing process. That is undeniably true where a license is issued or changed as a result of the proceedings. But as the language finally agreed on shows, it was also intended in cases where the proceedings are for some reason terminated short of such action. As we explain below (pages 34-42, *infra*), there are obvious reasons why that should be so.

b. The history of the Act also makes clear that the court of appeals' jurisdiction to review Commission orders does not depend on the holding of a hearing before the Commission. In fact, the original bill, which did provide for court of appeals review of "any order of the Commission" (H.R. 8862, § 189) (1 *Leg. Hist.* 167), did not even include the right to a hearing. That omission was the source of considerable concern, given the Commission's authority to revoke permits and licenses, to those who testified at the hearings on the bill. *AEA Hearings*, *supra*, at 65, 113-114, 152-153, 226-227, 328-329, 352-353, 400-401, 416-417 (2 *Leg. Hist.* 1699, 1747-1748, 1786-1787, 1860-1861, 1962-1963, 1986-1987, 2034-2035, 2050-2051). The problem was corrected in the substitute bill (H.R. 9757) by adding a new concluding sentence to Section 181 (1 *Leg. Hist.* 625):

> Upon application, the Commission shall grant a hearing to any party materially interested in any "agency action".

The difficulty with this provision was that it was "too broad, broader than it was intended to [be]." 100 Cong. Rec. 10686 (1954) (remarks of Sen. Pastore) (3 *Leg. Hist.* 3175). The right to a hearing had been added in response to concerns about the

licensing process; the obvious solution to the problem of overbreadth was to restrict the right to those proceedings. Senator Hickenlooper's amendment took that approach, moving the right to a hearing from Section 181 and making it a new subsection within Section 189 (1 *Leg. Hist.* 1145). The result was that the right to a hearing was confined to the same kinds of license proceedings for which judicial review was available. In Senator Pastore's words (100 Cong. Rec. 10686 (1954)) (3 *Leg. Hist.* 3175): "The amendment limits the provision to hearings on licenses in which a review shall take place."

It would be perverse, however, to turn that amendment into a limitation on the courts of appeals' reviewing authority. If there is any interdependence between the hearing and review provisions of Section 189, it actually works the other way around: the right to a hearing was made to depend (among other things) on the availability of subsequent review in the courts of appeals. That is quite a different thing from saying that review is only available if a hearing has been held.[21]

2. *Congress's Choice Of The Hobbs Act Indicates An Awareness That Orders Like The One Here Would Be Reviewed In The Courts Of Appeals*

As our discussion of the legislative history of the Atomic Energy Act makes clear, Congress was unwavering in its decision—made in the very first draft of the Act—to provide for review of Commission orders in licensing proceedings under the Hobbs Act.

[21] We note that although Congress amended Section 189 of the Atomic Energy Act in 1983, see note 2, *supra*, it did nothing to disturb the (at that time) consistent line of authority recognizing jurisdiction in the courts of appeals over Section 2.206 denials. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

That decision is significant because the latter Act, passed only four years earlier, explicitly contemplated court of appeals review of agency orders (including orders in licensing proceedings) entered without a hearing.[22]

The choice of the Hobbs Act is particularly important because of the role that statute played in the judicial review scheme for orders of the Federal Communications Commission (FCC). There is considerable evidence that Congress, in setting up the system of construction permits and operating licenses under the Atomic Energy Act, consciously paralleled the FCC licensing system.[23] The FCC system, like the

[22] The Hobbs Act was enacted in 1950 after a long history. At the suggestion of Chief Justice Stone, the Judicial Conference established a committee in 1942 to study the advisability of replacing the review procedures of the Urgent Deficiencies Act with a more modern judicial review system. H.R. Rep. 2122, 81st Cong., 2d Sess. 2 (1950). The Urgent Deficiencies Act, passed in 1913, provided for review of certain orders of the Interstate Commerce Commission by specially constituted three-judge district courts, and provided for direct appeal as of right to the Supreme Court. 38 Stat. 220. In time, the Act was applied to certain orders of the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C. (1940 ed.) 217, the Maritime Commission under the Shipping Act of 1916, 46 U.S.C. (1940 ed.) 830, and the Federal Communications Commission under the Federal Communications Act of 1934, 47 U.S.C. (1940 ed.) 402(a).

Legislation transferring review to the regular courts of appeals and limiting Supreme Court review to certiorari was introduced in 1947, but failed to pass. H.R. Rep. 2122 at 3. In 1950 the Hobbs Act effected the desired changes for orders of the Secretary of Agriculture, the FCC, and the Maritime Commission. 64 Stat. 1129. Review of ICC orders under the three-judge district court system was not abolished until 1975. Pub. L. No. 93-584, 88 Stat. 1917.

[23] See *AEA Hearings* 117-118 (2 *Leg. Hist.* 1751-1752); Green, *The Law of Reactor Safety*, 12 Vand. L. Rev. 115, 122

Atomic Energy Act (42 U.S.C. 2236, 2237), includes provisions for the revocation and modification of licenses (47 U.S.C. 312, 316), and permits persons affected to request that the FCC take such action.[24] Before enactment of the Hobbs Act, denials of at least some such requests were reviewed de novo by a three-judge district court.[25] After the Act was passed, however, they were reviewable in the courts of appeals, even where no hearing had been held in connection with the denial.

The Hobbs Act was expressly designed to accommodate review of agency orders like the one at issue here. Section 7(b) (28 U.S.C. 2347(b); see page

(1958); H. Marks & G. Trowbridge, *Framework for Atomic Industry: A Commentary on the Atomic Energy Act of 1954*, at 77 (1955).

[24] See, *e.g.*, *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811 (D.C. Cir. 1962); *CBS* v. *FCC*, 211 F.2d 644, 646-647 (D.C. Cir. 1954); *Radio Station WOW, Inc.* v. *FCC*, 184 F.2d 257, 258-259 (D.C. Cir. 1950). Cf. *Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 322-324 (D.C. Cir. 1974).

[25] 47 U.S.C. (Supp. V 1951) 402(a); *CBS* v. *FCC*, 211 F.2d at 647; *Radio Station WOW, Inc.* v. *FCC*, 184 F.2d at 259-260. Cf. *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470, and H.R. 2271 Before Subcomm. No. 3 and Subcomm. No. 4 of the House Comm. on the Judiciary (Hobbs Act Hearings)*, 81st Cong., 1st Sess. 71 (1949). See also *Hubbard Broadcasting, Inc.* v. *FCC*, 684 F.2d 594 (8th Cir. 1982), cert. denied, No. 82-772 (Feb. 22, 1983) (dismissal of petition for rulemaking); *Hobbs Act Hearings* 71 (same).

The proper path for judicial review was not crystal clear. But those cases that were not reviewable in a three-judge district court could be taken directly to the Court of Appeals for the District of Columbia Circuit. 47 U.S.C. (1946 ed.) 402(b); *Hobbs Act Hearings* 71-72; cf. *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d at 812-813.

15, *supra*) provides that "[w]hen the agency has not held a hearing * * * the court of appeals shall * * * pass on the issues presented, when a hearing is not required by law and * * * no genuine issue of material fact is presented[.]" On the other hand, when a hearing is required by law (*ibid.*), or when a party wishes to adduce additional evidence (28 U.S.C. 2347(c)), the Act provides for a remand of the proceedings to the agency.[26] The very point of that section was to assure court of appeals review of all orders entered by agencies such as the FCC. As Judge Phillips, chairman of the Judicial Conference Committee that drafted the Act, testified (*Hobbs Act Hearings*, *supra* note 25, at 30):

> After further study, the representatives of the * * * Communications Commission believed that we could go a little further * * *, and we concluded that we could include certain orders made by those administrative agencies without a hearing.

See also *id.* at 72.

The operation of these provisions is illustrated by *FCC* v. *ITT World Communications, Inc.*, No. 83-371 (Apr. 30, 1984). There the FCC denied ITT's petition for rulemaking about the Commission's authority to participate in international discussions of new carriers and services.[27] In denying the petition the

[26] When the statute governing the agency's procedure does not require the holding of a hearing, but a genuine issue of material fact is presented, the Act provides for transfer of the proceedings to the district court. 28 U.S.C. 2347(b)(3). This provision is seldom used. For a rare example, see *Lake Carriers' Ass'n* v. *United States*, 414 F.2d 567 (6th Cir. 1969).

[27] Although the case involved the denial of a petition for rulemaking rather than the denial of a request for license revocation, the difference is not significant for purposes of the

FCC received comments and reply comments, but did not hold a hearing. *In re ITT World Communications, Inc.*, 77 F.C.C.2d 877, 879-882 (1980). This Court nevertheless held that (slip op. 4-5):

> Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the Court of Appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Litigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order. * * *
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> * * * Respondents contend that * * * the record developed upon consideration of the rulemaking petition by the agency does not enable the Court of Appeals fairly to evaluate their *ultra vires* claim. If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, * * * or in some circumstances refer the case to a special master, see 28 U.S.C. 2347(b)(3).

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issue here. Section 189 of the Atomic Energy Act deals with review of final orders entered in "any proceeding * * * for the granting, suspending, revoking, or amending of any license or construction permit, * * * and * * * any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees" (42 U.S.C. 2239). Since the court here restricted court of appeals review to orders entered in "formal 'proceedings'" (Pet. App. 11), denial of a rulemaking petition without a hearing would—like this case—go in the first instance to the district court.

The differences between denial of a petition for rulemaking and denial of a request for license revocation are no more significant for purposes of discerning Congress's intent about the appropriate forum for review. Section 189 treats both kinds of orders alike. And if Congress intended that FCC denials of rulemaking petitions be reviewed in the courts of appeals (even where no hearing was held), it is safe to assume that it envisioned similar treatment for similar NRC orders when it said that they too were to be governed by the Hobbs Act.

The legislative record of the Hobbs Act also explains the reasons for favoring court of appeals review, in terms that apply with equal force to this case. The pattern for such review, Congress noted, had been

> established for * * * orders of the Federal Trade Commission in 1914 (15 U.S.C. 45c) and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. It is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies.

H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950).

The approach chosen was seen as far more efficient than the method then in use—review by a three-judge district court with trial de novo. See note 22, *supra*; S. Rep. 2618, 81st Cong., 2d Sess. 3 (1950). In part that was because "three-judge courts are not well adapted for conducting hearings." H.R. Rep. 2122 at 4. More important, however, Congress recognized that "the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice" (*ibid.*). The possibility that "a suitable hearing [might] not [have been] held prior to initiation of the proceeding in the court of appeals" did not warrant departure from the new statutory scheme. Instead, the Act included "provisions in section 7(b) and (c) for the taking of evidence either by the agency or in the district court [see note 26, *supra*]" in such cases.

C. Compelling Practical Considerations Support The Interpretation Of Section 189 Rejected By The Court Of Appeals

The court below recognized (Pet. App. 11-12) that its decision was contrary to the widely held view that court of appeals review is the most efficient and practical route for most administrative orders. It concluded, nevertheless, that the plain language of the statute prevented it from weighing such considerations in reaching its decision (*ibid.*). What we have said up to this point demonstrates that both the language and the legislative history of Section 189 are consistent with an interpretation that permits review in the courts of appeals. It is thus appropriate to weigh the relative practicalities of the alternatives. See *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980). As we now show, those considerations strongly support the interpretation we urge, for as Professor Davis has noted, it is a "highly practical" one. 4 K. Davis, *Administrative Law Treatise* § 23.5, at 140 (1983).

1. *The Court Of Appeals' Construction Will Lead To Bifurcated Or Serial Review Of NRC Orders In License Proceedings*

The court of appeals' holding has the anomalous result of making the proper forum for review depend on whether a Section 2.206 request is granted or denied. In the latter case (the situation here) review must proceed first to the district court. In the former case review would occur in the court of appeals, since a hearing would ordinarily be held. See 10 C.F.R. 2.202.[28] One may justifiably doubt that Congress contemplated such an unusual division of jurisdiction when it enacted Section 189. That allocation of authority is not just peculiar, though. It has quite undesirable practical consequences.

[28] Even after a hearing is held the NRC may decide to take no action against the licensee. In that event one has the rather capricious result that similar decisions (to take no action affecting a license) by the same body are reviewable in different courts, depending on the stage of the proceedings at which a decision is rendered.

a. One consequence of parsing jurisdiction in that way is that it leads to bifurcated review when the Section 2.206 denial is closely related to another NRC order reviewable in the court of appeals. A good example is provided by *Rodriguez* v. *NRC*, dismissed, No. 83-1805 (D.C. Cir. May 25, 1984). There the failure of the licensee's circuit-trip breaker required a reactor to be manually shut down. On April 12, 1983 Rodriguez filed a Section 2.206 request, seeking to have the NRC keep the reactor shut down until the licensee had properly analyzed the causes of the circuit breaker failure. On April 28, 1983 the licensee submitted to the NRC a program for corrective action. On April 29, 1983 the Director of the Office of Nuclear Reactor Regulation denied petitioner's Section 2.206 request, concluding that the licensee's proposed program adequately resolved any concerns. And on May 6, 1983 the NRC issued an immediately effective license amendment, requiring the licensee to implement the program proposed on April 28. Rodriguez then sought review in the court of appeals of: (i) the order denying his Section 2.206 request, and (ii) the order directing an immediately effective license amendment. Under the jurisdictional scheme created by the decision in this case, (i) was reviewable in the district court, while (ii) went to the court of appeals.[29] See also *Rockford League of Women*

[29] A February 9, 1984 order issued by the court in *Rodriguez* actually makes the matter more confusing still. The challenge

Voters v. *NRC*, 679 F.2d at 1219; *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d at 1027; 48 Fed. Reg. 4589 (1983).

That bifurcation of review is similar to the problem addressed by this Court in *Foti* v. *INS*, 375 U.S. 217 (1963). The issue in *Foti* was whether the Attorney General's refusal to suspend deportation was reviewable in the court of appeals under the Hobbs Act. "Although deportability and whether to grant a suspension are determined in the same hearing, the [court of appeals'] decision [in that case] mean[t] that an alien [could] appeal only the deportability finding to a Court of Appeals and [had] initially [to] seek review of a denial of suspension in a District Court" (375 U.S. at 226). This Court held that "[b]ifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232). See also *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980) ("Absent far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly

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to the license amendment was dismissed as untimely, and the petition for review of the denial of the Section 2.206 request was dismissed with a citation to this case. The court of appeals went on to hold, however, that "the issue of whether the petition may properly be regarded as a request for public hearing, in a pending license modification proceeding, under 42 U.S.C. § 2239(a) must be considered" in the court of appeals. The lesson seems to be that when a Section 2.206 request is denied, that order may itself be reviewed simultaneously in the district court and the court of appeals if the petition for review is phrased artfully enough. We have reproduced the February 9, 1984 *Rodriguez* order at App., *infra*, 1a-2a.

A joint motion to dismiss was filed in *Rodriguez* on May 18, 1984, and granted by the court of appeals on May 25, 1984.

irrational bifurcated system."); *Investment Company Institute* v. *Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1098-1099 (D.C. Cir. 1970); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 60 (1976) (Currie & Goodman); L. Jaffe, *Judicial Control of Administrative Action* 158-159, 422 (1965) (Jaffe).

b. Even if there were no risk of simultaneous district and appellate court review, there is little to be gained in these cases from serial review by two tiers of courts. As Judge Posner noted in *Rockford League of Women Voters* v. *NRC*, 679 F.2d at 1221: "This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request * * *: by the Director of Nuclear Reactor Regulation, by the full Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much."

Such protracted proceedings cause delay. "The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second round on appeal." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980); *Foti* v. *INS*, 375 U.S. at 226; Currie & Goodman, 75 Colum. L. Rev. at 16; Note, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U. L. Rev. 765, 793 (1983) (Note). As the Administrative Conference has said, "direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system." 1 C.F.R. 305.75-3(g). This is particularly true in the context of nuclear power reactor licensing. See *Quivira Mining Com-*

pany v. *EPA*, 728 F.2d 477, 482 (10th Cir. 1984). It is an acknowledged fact that the unavoidable costs of delay prior to reactor construction and in interrupted operation—to which multiple layers of review inevitably contribute—have reached astonishing proportions. See *Union of Concerned Scientists* v. *NRC*, No. 82-2053 (D.C. Cir. May 25, 1984), slip op. 9 n.6 (MacKinnon, J., dissenting). Prolonging the review process for decisions in enforcement proceedings will only exacerbate the effect on licensees and recipients of construction permits.[30]

Serial review in this context is not only time-consuming, but also redundant. There is no need in the case of Section 2.206 denials for the kind of fact-sifting and issue-clarification that district courts can usefully undertake in other contexts. The reviewing court here will have before it a record of 547 pages, along with the decision of the Director of Nuclear Reactor Regulation explaining the reasons for the denial (Pet. App. 16-25). The NRC's regulations assure that such an explanation will be available in every case. 10 C.F.R. 2.206.[31] There may also be a

[30] We recognize that orders denying Section 2.206 requests, because they in essence decline to pursue enforcement action, do not in themselves contribute to the problem of delay. Nor would the process of review do so unless at some point the order was overturned. But as we note below, page 40, one of the drawbacks of district court review is the higher probability of an incorrect decision doing just that, rendered by "a district court with little knowledge of an agency's work [that is] required to handle an odd case." Jaffe, *supra*, at 159. Moreover, it cannot be ignored that the pendency of litigation itself—because an unfavorable outcome portends costs of compliance—has an impact on the cost of operation and a utility's ability to finance construction.

[31] Moreover, as we pointed out above (page 4 & note 4), the Commission will typically publish notice that a request has been received; and comments submitted in response to the notice become part of the record on review.

similar decision by the full Commission. 10 C.F.R. 2.206(a).[32]

The issues on judicial review of such decisions are whether the refusal to issue a show cause order was arbitrary and capricious, and whether the record shows "'a consideration of the relevant factors.'" *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d at 1030-1031 (quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971)). In resolving those questions the court of appeals will derive little benefit from the prior efforts of a district court. On the contrary, it will simply

> render an independent decision on the basis of the same administrative record as that before the district court; the identical standard of review is employed at both levels; and once appealed, the district court decision is accorded no particular deference.

First National Bank v. *Smith*, 508 F.2d 1371, 1374 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975); *Amusement & Music Operators Ass'n* v. *Copyright Royalty Tribunal*, 636 F.2d 531, 534 (D.C. Cir. 1980).

[32] Recent decisions by this Court have made clear, in any event, that the informality of agency action is not in itself a sufficient reason for eschewing court of appeals review. See, *e.g.*, *FCC* v. *ITT World Communications, Inc.*, slip op. 4-5; *Harrison* v. *PPG Industries, Inc.*, 446 U.S. at 583, 592-594. That is largely because the Hobbs Act provides a mechanism for supplementing the record where it is deficient, by remanding the case to the agency. 28 U.S.C. 2347(b)(1) and (c).

2. *Review Under The Hobbs Act Better Respects The Different Competencies Of The District Courts And The Courts Of Appeals*

As we have already noted (page 38), district courts are functionally better equipped than the courts of appeals to perform the tasks of fact-finding and issue-clarification. The nature of the agency action being reviewed here, however, makes no special demand for those abilities. On the contrary, expenditure of district court resources is unusually inefficient in cases like this, which involve complex regulatory statutes and administrative schemes with which the courts of appeals are much more familiar. If the decision in this case is affirmed, "a district court with little knowledge of [the] agency's work will be required to handle an odd case" from time to time. Jaffe, *supra*, at 159. The court of appeals, on the other hand, have developed a reservoir of experience in this area because litigation involving NRC license orders and rulemaking proceedings—under the terms of Section 189—typically bypass the district courts. Direct review takes advantage of this expertise and contributes to uniformity of decisions. For this reason the Administrative Conference has recommended that even "[i]nformal orders issued by agencies that mainly engage in formal adjudication and the formal orders of which are * * * subject by statute to direct review by the courts of appeals * * * should * * * be reviewable by the courts of appeals." 1 C.F.R. 305.75-3 recommendation 6(b)(iii). See also Note, 63 B.U.L. Rev. at 792-793; Currie & Goodman, 75 Colum. L. Rev. at 12.

Nor does resolution of these issues call for any of the other distinctive contributions that district courts make to the judicial process. One service performed by multiple tiers of review (claims under the Social

Security Act are a prominent example) is that the district courts play a "vital screening role * * * in holding down the volume of appellate litigation * * *." Currie & Goodman, 75 Colum. L. Rev. at 6. By contrast, "[t]he court[s] of appeals [are] the appropriate reviewing forum for [even] informal actions that * * * [a]re either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually" (1 C.F.R. 305.75-3 recommendation 6(b)(iii)).

As we noted in our petition (Pet. 15-16 & n.12), although Section 2.206 requests have historically been numerous, petitions for judicial review of denials have not been. Between 1974 and 1984 the NRC received 204 Section 2.206 requests. In only eight of those was judicial review sought after the request was denied. While there are indications that petitions for review may be filed more frequently in the future (see Pet. 16 n.12), such litigation does not portend any unmanageable burden for the courts of appeals.

Still another advantage of district court review is the convenience of venue. In proceedings under the Social Security Act—*e.g.*, for review of adverse administrative decisions on disability—the plaintiff has the right to a forum in the judicial district where he resides. 42 U.S.C. (Supp. V) 405(g). In such situations "[t]he obvious theory of a district court venue is that the typical plaintiff is a person of modest means." Jaffe 158. Here, however, there is no basis for presuming as a general matter that petitioners will fit that description.

This review of practical considerations only confirms what the court of appeals recognized—that this is a case where direct review in the court of appeals should be heavily favored. Since there is no merit to the court's conclusion that the statutory language

barred achievement of the result that practicality and good sense dictate, there is no reason to forego the benefits of direct review.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for disposition on the merits.

Respectfully submitted.

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JUNE 1984

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1805

September Term, 1983

JOSEPH H. RODRIGUEZ
Public Advocate of the State of New Jersey,
PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
INTERVENOR

[Filed Feb. 9, 1984]

BEFORE: Robinson, Chief Judge; Wald and Scalia, Circuit Judges.

ORDER

Upon consideration of this Court's order to show cause dated August 23, 1983 and the responses received, it is

ORDERED by the Court that:

1. The order to show cause is discharged.

2. That portion of the petition for review related to the Order Modifying License Effective Immediately dated May 6, 1983 is dismissed as untimely filed. 28 U.S.C. § 2344.

3. That portion of the petition for review related to the denial of petition under 10 C.F.R. § 2.206, being timely filed, may proceed to argument. Although such petition, insofar as it constitutes a petition for enforcement action, is not appealable here, *Lorion v. NRC*, 712 F.2d 1472 (D.C. Cir. 1983), the issue of whether the petition may properly be regarded as a request for public hearing, in a pending license modification proceeding, under 42 U.S.C. § 2239(a) must be considered.

4. Petitioner's brief shall be due 40 days from the entry of this order.

5. Respondent's brief shall be due 30 days thereafter.

The Clerk shall include this case in the pool of cases available to be drawn for this Court's September, 1984 sitting period.

Per Curiam
For The Court

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

Chief Judge Robinson did not participate in this order.

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